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IN THE

Supreme Court of the United States

October Term, 1961.

No. 831.

CAMDEN TRUST COMPANY,

Petitioner,

v.

RAY M. GIDNEY, COMPTROLLER OF THE CURRENCY,

and

DELAWARE VALLEY NATIONAL BANK OF DELAWARE TOWNSHIP,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

BRIEF FOR DELAWARE VALLEY NATIONAL BANK OF DELAWARE TOWNSHIP, RESPONDENT, IN OPPOSITION.

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April 30, 1962.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF FOR DELAWARE VALLEY NATIONAL BANK OF DELAWARE TOWNSHIP, RESPONDENT, IN OPPOSITION.

OPINIONS BELOW.

The findings of fact, conclusions of law, order and judgment of the United States District Court for the District of Columbia are found at pages 102a-107a of the Joint Appendix (R. 102a-107a).[1] The District Court did not hand down an opinion. The opinions of the Court of Appeals for the District of Columbia Circuit (App. of Petition, pp. 1a-9a) have not yet been reported.

1. Following the practice adopted by petitioner, references herein to pages of the Record will be to the pages so numbered of the Joint Appendix in the court below.

JURISDICTION.

The petition properly states the grounds on which the jurisdiction of this Court is invoked.

QUESTION PRESENTED.

When application is made to the Comptroller of the Currency to organize a new national bank, which will be affiliated at the time of its formation with an existing national bank by overlapping stock ownership and by identity of directors, is the Comptroller required to treat the application as one for the opening of a branch office of the existing bank?

STATUTES INVOLVED.

1. National Bank Act. The provisions of the National Bank Act applicable to the formation of national banking associations are found in R. S. §§ 5133, 5134, 5135, 5136 (as amended), 5168, 5169 and 5170; U. S. C., Title 12 §§ 21, 22, 23, 24, 26, 27 and 28. The pertinent provisions thereof are as follows:

> "§ 21. Formation of national banking associations; incorporators; articles of association
>
> Associations for carrying on the business of banking under this chapter may be formed by any number of natural persons, not less in any case than five. They shall enter into articles of association, which shall specify in general terms the object for which the association is formed, and may contain any other provisions, not inconsistent with law, which the association may see fit to adopt for the regulation of its business and the conduct of its affairs. These articles shall be signed by the persons uniting to form the association,

and a copy of them shall be forwarded to the Comptroller of the Currency, to be filed and preserved in his office."

"§ 22. Organization certificate.

The persons uniting to form such an association shall, under their hands, make an organization certificate, which shall specifically state:

First. The name assumed by such association; which name shall be subject to the approval of the Comptroller of the Currency.

Second. The place where its operations of discount and deposit are to be carried on, designating the State, Territory, or District, and the particular county and city, town, or village.

Third. The amount of capital stock and the number of shares into which the same is to be divided.

Fourth. The names and places of residence of the shareholders and the number of shares held by each of them.

Fifth. The fact that the certificate is made to enable such persons to avail themselves of the advantages of this chapter."

"§ 23. Acknowledgment and filing of certificate

The organization certificate shall be acknowledged before a judge of some court of record, or notary public; and shall be, together with the acknowledgment thereof, authenticated by the seal of such court, or notary, transmitted to the Comptroller of the Currency, who shall record and carefully preserve the same in his office."

"§ 24. Corporate powers of associations

Upon duly making and filing articles of association and an organization certificate a national banking association shall become, as from the date of the execution

of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power * * * [powers enumerated]."

"§ 26. Comptroller to determine if association can commence business

Whenever a certificate is transmitted to the Comptroller of the Currency, as provided in this chapter, and the association transmitting the same notifies the comptroller that at least 50 per centum of its capital stock has been duly paid in, and that such association has complied with all the provisions of this chapter required to be complied with before an association shall be authorized to commence the business of banking, the comptroller shall examine into the condition of such association, ascertain especially the amount of money paid in on account of its capital, the name and place of residence of each of its directors, and the amount of the capital stock of which each is the owner in good faith, and generally whether such association has complied with all the provisions of this chapter required to entitle it to engage in the business of banking; and shall cause to be made and attested by the oaths of a majority of the directors, and by the president or cashier of the association, a statement of all the facts necessary to enable the comptroller to determine whether the association is lawfully entitled to commence the business of banking."

"§ 27. Certificate of authority to commence banking

If, upon a careful examination of the facts so reported, and of any other facts which may come to the knowledge of the comptroller, whether by means of a special commission appointed by him for the purpose of inquiring into the condition of such association, or otherwise, it appears that such association is lawfully

entitled to commence the business of banking, the comptroller shall give to such association a certificate, under his hand and official seal, that such association has complied with all the provisions required to be complied with before commencing the business of banking, and that such association is authorized to commence such business. But the comptroller may withhold from an association his certificate authorizing the commencement of business, whenever he has reason to suppose that the shareholders have formed the same for any other than the legitimate objects contemplated by this chapter."

"§ 28. Publication of certificate

The association shall cause the certificate issued under section 27 of this title to be published in some newspaper printed in the city or county where the association is located, for at least sixty days next after the issuing thereof; or, if no newspaper is published in such city or county, then in the newspaper published nearest thereto."

2. Administrative Procedure Act. Section 10 of the Administrative Procedure Act of June 11, 1946, c. 324, 60 Stat. 243, U. S. C., Title 5 § 1009, provides in pertinent part:

"§ 1009. Judicial review of agency action

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

* * *

(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant

questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

3. The Petition accurately sets forth excerpts from the branch banking provisions of the National Bank Act, R. S. § 5155, as amended; U. S. C., Title 12, § 36. Similarly it accurately sets forth excerpts from §§ 1(2) and 19 of The Banking Act of 1948 of the State of New Jersey (N. J. S. A. 17:9A-1(2); 19). It is the view of the respondent and of both the courts below that these statutes have no application to this case.

STATEMENT OF THE CASE.

This litigation involves the formation of a new national bank in Delaware Township, Camden County, New Jersey. The new bank, as will be shown, will be affiliated initially with an existing national bank in the adjacent Borough of Haddonfield, and will open its office at a location at which the existing bank is barred by law from establishing a branch. The formation of the new bank has been strenuously opposed by Camden Trust Company, which has one of its branch offices in Delaware Township, primarily on the ground that the initial affiliation between the new bank and the existing bank in Haddonfield requires the former to be treated as a proposed branch office of the latter. A chronological summary of the facts follows.[2]

Under date of February 23, 1960, application was made to the Comptroller of the Currency to organize a national bank in Delaware Township, Camden County, New Jersey. The nine individuals who signed the application were at the time directors of the Haddonfield National Bank but in executing and filing it, they were not acting in their capacities as such (R. 33a, 39a-40a).

On November 21, 1960, the office of the Comptroller of the Currency advised the applicants of the preliminary approval of the application, subject to certain conditions relating to the holding of a meeting of the subscriber shareholders to elect a Board of Directors and approve expenses (R. 34a, 41a-43a).

On December 8, 1960, Mr. Horace G. Moeller, president of the Haddonfield National Bank, addressed a letter to the shareholders of that bank as follows (R. 8a, 13a, 35a):

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2. The Petition seeks review of an affirmance by the court below of the granting by the District Court of motions for summary judgment by the respondents. The material facts thus are to be found in the allegations of the pleadings and affidavits filed by the parties in the District Court.

"HADDONFIELD
NATIONAL BANK
Haddonfield, N. J.

December 8, 1960

"To the Shareholders of Haddonfield National Bank

"On many occasions your Board of Directors and Officers have been invited by the residents and business men of Delaware Township to extend banking facilities to that area by the establishment of a branch office in that fast growing municipality. Under the New Jersey banking law, to which we are subject with regard to branches, it is not permissible for a bank, other than in its home community, to establish a branch office in a municipality where a banking office already exists. It is possible, however, to apply for a charter to start a new bank where the need, both present and future, would appear to exist. In line with that reasoning your Board of Directors as individuals, applied and have received from the Comptroller of the Currency, preliminary approval to establish a new bank to be known as the Delaware Valley National Bank of Delaware Township, to be located in the Barclay Farm area.

"The new bank proposes to issue 22,500 shares ($10 par) stock @ $23.00 per share and the proceeds from the stock sale will be divided as follows:

Capital	$225,000.00
Surplus	225,000.00
Undivided Profits	67,500.00

"It is expected that the Delaware Valley National Bank will be an affiliate of the Haddonfield National Bank and that its affairs will be conducted by the same management and under the same policies as the Haddonfield National Bank.

"The Board of Directors of the Haddonfield National Bank feels this is a very worthwhile undertaking and as shareholders you are invited to subscribe for shares in the new bank. Will you please indicate on the stub, which appears at the bottom of this letter, *whether or not* you are interested in purchasing shares in the new bank and to what extent. We would appreciate hearing from you within the next 10 days and a self-addressed postage paid envelope is enclosed for your convenience when replying.

Sincerely,

H. Moeller
President"

Since 1953 Camden Trust Company had operated a branch which at the time the application for the new bank was filed was still the only banking facility in Delaware Township. To avoid competition and protect its monopoly, it protested to the Comptroller of the Currency both orally and in writing against the application to organize the new bank (R. 6a, 7a, 16a, 32a, 42a, 84a).

Pursuant to the instructions of the office of the Comptroller of the Currency and to the provisions of the National Bank Act the applicants on January 19, 1961, entered into Articles of Association and forwarded a copy to the Comptroller and made, acknowledged and transmitted to the Comptroller an Organization Certificate (R. 34a, 53a-55a, 56a-61a), whereupon the new bank became a body corporate, as provided by U. S. C., Title 12 § 24, with all the powers conferred upon it by that Section.

Under date of January 27, 1961, the office of the Comptroller of the Currency advised the new bank that its corporate existence had been established, but that before a certificate of authority to commence the business of banking could be issued, certain requirements had to be met relating to the furnishing of evidence that all its capital stock had been duly paid in, that the required subscription to stock

of the Federal Reserve Bank of Philadelphia had been made, and that capital funds had been expended only for proper organization expenses (R. 34a, 44a-46a).

On January 3, 1961, Camden had filed its complaint herein against the Comptroller, seeking a declaratory judgment that he is prohibited by the branch banking provisions of the National Bank Act (R. S. § 5155, as amended; U. S. C., Title 12 § 36) from authorizing the establishment of the new bank and its commencement of the business of banking, and further seeking a temporary restraining order and preliminary and permanent injunctions against such actions by the Comptroller (R. 5a-14a). The new bank was granted leave to intervene as a defendant (R. 28a-30a), and its answer to the complaint was thereafter filed (R. 31a-46a).

The three parties filed cross motions for summary judgment (R. 51a-65a, 66a, 79a), and various affidavits were filed.

After full argument, the District Court entered an order on August 12, 1961, finding that there were no material issues of fact and that the Comptroller and the new bank, the respondents, were entitled to summary judgment, granting their motions for summary judgment, and denying Camden's motions for preliminary injunction and for summary judgment (R. 102a). The order directed the Comptroller to submit findings of fact and conclusions of law in accordance therewith. The District Court's findings of fact and conclusions of law (R. 103a-106a) were filed on August 16, together with a final judgment. On motion by Camden, the District Court on the same day entered an order restraining the Comptroller from issuing a certificate authorizing the new bank to commence business pending the outcome of an appeal to the Court of Appeals, and directing Camden to file a $25,000 bond conditioned upon payment to the new bank of all loss and damage suffered by it as a result of the delay in its receipt of authorization to commence business, in the event that the appeal should ultimately be unsuccessful.

The appeal was argued on November 14, 1961, before a panel consisting of Circuit Judges Walsh, Danaher and Bastian. On January 18, 1962, the Court of Appeals affirmed the judgment of the District Court, Circuit Judge Bastian dissenting. The majority held that the new bank "clearly is not a branch of Haddonfield but is a completely separate entity . . ."; that the branch banking provisions of the National Bank Act have no applicability to this situation; and that the actions sought to be enjoined were "within the authority conferred by existing statutes". The majority opinion states:

> "It is not within our province to pass upon the desirability *vel non* of permitting a national bank to have an 'affiliate', as the appellant has here used the term. If such an affiliate is to be denied status, Congress must clearly say so."

The petitioner sought a rehearing before the Court of Appeals *in banc*. This petition was denied by order indicating that of the entire Court only Chief Judge Miller and Circuit Judge Bastian favored a rehearing.

Camden thereupon filed a motion to the Court of Appeals for a stay of the issuance of that Court's mandate, and a motion for a further stay of the issuance thereof, both of which were denied, Circuit Judge Bastian again dissenting.

The petitioner then filed an application to this Court for a stay of the issuance of the mandate of the Court of Appeals pending the filing and disposition of a petition for a writ of certiorari, which application was denied by Mr. Justice Clark on April 4, 1962.

ARGUMENT.

The standards fixed by this Court in its Rule 19(b) for the review on *certiorari* of decisions of the Courts of Appeals cannot be met in this case. There is no question of radical departure by either court below from the accepted and usual course of judicial proceedings. It is not suggested that the decision is in any way in conflict with applicable decisions of this Court. There is no state or territorial question involved. The decision of the Court of Appeals does not conflict with decisions of any other Court of Appeals. Moreover, as petitioner concedes (Petition, p. 12), such a conflict is precluded in the future because the Comptroller of the Currency can be sued only in the District of Columbia.[3]

There remains of the standards fixed by Rule 19 only one consideration upon which petitioner relies: that the Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court. The claim of such importance is indefensible, as will be demonstrated. Our argument to that effect will, however, be preceded by the development of another potent reason for denial of the petition, namely the correctness of the decision below.

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[3] The combined effect of the federal venue statute (62 Stat. 935; U. S. C., Title 28 § 1391) and Rule 4 of the Federal Rules of Civil Procedure (U. S. C., Title 28, F. R. C. P. 4), governing service of process, is to confine litigation attacking actions of the Comptroller to the District of Columbia. E.g., *Blackmar v. Guerre*, 342 U. S. 512 (1952); *Hartmann v. Federal Reserve Bank*, 55 F. Supp. 801, 810 (D. C. E. D. Pa. 1944); *Stein v. Delano*, 35 F. Supp. 260 (D. C. D. N. J. 1940); *Nesbitt Fruit Products, Inc. v. Wallace*, 17 F. Supp. 141 (D. C. S. D. Iowa 1936).

I.

The Decision Below Was Correct.

A. The Comptroller Properly Exercised His Statutory Discretion.

The petitioner challenges the power of the Comptroller of the Currency to approve the creation of a new national bank which is to be affiliated with an existing bank, or at lease his power "knowingly" to do so.[4] One looks in vain for any support for this contention in the law governing the creation of national banks. No suggestion that the Comptroller should consider this among the other factors he weighs is to be found.

Rather than upon any express provision of law Camden relies upon the legislative history of the 1927 and 1933 branch banking legislation to support this aspect of its argument, but its interpretation of that history is strained and false. The legislative history shows to the contrary that Congress recognized affiliates as a common phenomenon and fully legal.

Camden concedes, as it must, that at the time of enactment in 1927 of the statute first adding to the National Bank Act a limited branch banking authority, as well as at the time the present broader branch provisions were adopted in 1933, Congress was well aware of the existence of the institutions of chain and group banking and of the widespread and long-continued resort to those forms of multiple banking by national banks, which were theretofore absolutely prohibited from having branches, and by state banks in those jurisdictions where branching powers were limited or denied. Petitioner accurately states, with support from the Congressional Record, that the legislators saw dangers and evils in the chain and group bank situations. But what the Congress did was not to limit or deny

4. The inconsistency of this argument and the petitioner's argument that in authorizing the creation of new affiliated banks the Comptroller must apply branch bank principles is obvious. Its inconsistency with the position taken by the *Amicus Curiae*, The National Association of Supervisors of State Banks, is also significant.

the power of the Comptroller to permit the establishment of new chain or group affiliates, but instead to authorize national banks to establish branches. Clearly if the Congress had intended that the Comptroller be denied the power to creat affiliates, it would have done so by direct prohibition.

A more logical and accurate interpretation of the legislative history of the national bank branch laws than that offered by Camden can readily be found. The discussions on the floor of Congress in 1932 and 1933 make clear the nature of the evil which the legislators saw in bank chains and groups—they were their financial instability and their inability to withstand the great depression then afflicting the nation. Banks were failing, and where one bank in a chain failed, many others sometimes went under with it. Representative Steagall mentions one case where the failure of one bank in Georgia caused the failure of 180 other banks in the chain in one day (68 Cong. Rec. 2175). This was the consequence, of course, not of the mere fact that the 181 banks were affiliated, but of the dealings among the affiliates—the loans from affiliate to affiliate, the investment by one bank of its funds in securities of another, and the establishment of many banks on a capitalization adequate for only one. In Carlinfour, Branch, Group and Chain Banking (1931), the following text and footnote appear at page 89:

> "One may readily see * * * the many potential dangers that attended the grouping of control of a number of financial institutions under the supervision and administration of one or more individuals. Unscrupulous individuals frequently loaded the banks with paper from the agricultural or industrial speculations in which they were interested instead of diversifying their risk in accordance with the sound, fundamental principles of banking.
>
> "These chains were situated very largely in the rural districts, and the member banks of the chain were

principally small country banks. * * * Many of these chains have come to disaster through the failure of all of the banks which constituted them.[15]

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15. No information is available as to chain failures except insofar as it is known that many failed during the panic of 1907 and the years immediately following, and the economic depression of 1920-1921. * * * By reason of inter-relation of stock interests, the trouble of one institution was conveyed to others of the system, resulting in widespread collapses. * * *"

But what the proponents of the enlarged branching authority for national banks were trying to do was not to prohibit outright the formation of new group or chain affiliates, but to alleviate the dangers of the existing situation by enabling affiliates to merge and become branch offices and also to offer in the future an alternative, branch banking, to the existing national banks which were determined to get into multiple banking in order to compete on equal footing with their neighboring state-chartered banks. A typical exposition of this theory is found in the testimony of Comptroller Pole before the House Committee on Banking and Currency in 1930 during its inquiry into multiple banking in all its forms:

"*Mr. Goldsborough.* * * * I believe you stated, did you not, one reason for the extension of the right to establish branches of banks, was the fact that these groups were being formed that you did not approve of? * * *

"*Mr. Pole.* I have made objections to the group banking system * * *, my particular reasons being that it is difficult to supervise groups of banks * * *, and I think I have usually said as an ultimate system, I was very much in favor of branch banking, as against group banking.

"*Mr. Goldsborough.* Your idea is, I suspect, that if it were permitted further to extend branches * * *, that that would tend to abolish or do away with group banking, automatically?

"*Mr. Pole.* I feel quite sure that the groups themselves would prefer to operate under the branch system rather than the group system and I think that that would automatically change from one to the other. * * *

"*The Chairman.*' I think it would be helpful to the Committee if you will tell the committee just how you propose to stop group and chain banking under your plan of extending branch banking in trade areas.

"*Mr. Pole.* My plan is this: If banks are given the right to operate branch systems, the advantages would be such as to automatically convert these groups and chains into branches for the most part." *Hearings before House Committee on Banking and Currency (Branch, Chain, and Group Banking), 71st Cong., 2nd Sess. (1930), Vol. 1, pp. 246-249.*

Senator Glass also made this goal of the legislation clear in his statements, reported at 75 Cong. Rec. 9893:

"It is the view of the Committee, upon information presented, that if we do not adopt state-wide branch banking, the holding companies and the banks which they hold are going to be pretty soon wrecked. I do not know that it ought to be stated here, but we want to consider this whole problem in frankness. If the existing requirements of the law were put into effect by the Comptroller of the Currency, there are hundreds of banks which have not yet closed their doors, whose capital and surplus have been impaired, which would have to be closed up today, and unless we do something of this nature, that part of the country where these holding companies exist * * * are going to find themselves in inextricable difficulties. * * * They would convert their banks into branches. They would convert their holding companies into banks. They would convert the banks which they hold into branches, with the double liability. If they are as skillful as they have

seemed to us to be, they would manage to increase their capital holdings so as to insure the soundness and solvency of these banks as branches."

Thus one aspect of the Congressional approach to the dangers then regarded as inherent in the group and chain banking situations was to hold out to those involved or interested in those approaches to multiple banking a strong inducement to abandon them in favor of branch banking. But the legislation enacted in 1933 went beyond this in its efforts to alleviate the risks perceived in group and chain banking; it contained stringent regulations designed to prevent the practices which created the risks.

Section 2 of the 1933 Act (Act of June 16, 1933, c. 89, § 2, 48 Stat. 162, U. S. C., Title 12 § 221a) contained detailed definitions of the terms "affiliate" and "holding company affiliate". Section 13 of the Act (U. S. C., Title 12 § 371c) imposed strict limitations on the amounts which any member bank could lend to any affiliate, invest in the obligations of such affiliate, or lend on the security of a pledge of securities or obligations of such affiliate. It also required permitted loans to affiliates to be heavily collateralized.

Section 19 of the Act (U. S. C., Title 12 § 61) imposed controls on the voting of national bank shares by a holding company affiliate, it being required that a voting permit be first obtained from the Board of Governors of the Federal Reserve System. In applying for such a permit the affiliate must consent to examination into its affairs by the bank examiners in conjunction with their examination of all its bank affiliates. Also required was the investment of a substantial part of the holding company affiliate's funds in readily marketable assets other than bank stock, which amount was lessened if the shareholders of the holding company assumed its liability to assessment as a shareholder in its bank affiliates. Finally, the holding company applicant was required to divest itself of all holdings in securities companies and to agree not to acquire any such holdings thereafter.

Section 20 of the Act (U. S. C., Title 12, § 377) prohibits affiliation between member banks and securities companies.

Sections 27 and 28 of the Act (U. S. C., Title 12, §§ 161, 481) reinforce the voting permit provisions applicable to holding company affiliates by requiring national banks, in reporting their condition periodically to the Comptroller, to obtain similar reports from their affiliates for the Comptroller, and by authorizing bank examiners, in examining the affairs of national banks, to examine also the affairs of their non-member affiliates.

Obviously the Congress was unwilling to rely entirely on the allure of branch banking to eliminate the problems attendant on group and chain banking, and by these measures they attacked and eliminated the most evident and important ones—the exaggerated interdependence of the banks which were in the same chain or group, the risks inherent in involvement through affiliates in the securities business, and the lack of an opportunity for the bank examiners to make a comprehensive examination of an entire group or chain.

The inclusion in the very Act in which Congress gave broadened branching powers to national banks of these detailed curative measures directed at the dangers recognized and feared in group and chain banking can only be interpreted as recognition of the legality of affiliation of national banks with other banks. Further, it destroys Camden's contentions that the intent of Congress in enacting the 1933 Banking Act was to suppress and render illegal group and chain banking, and its contention that Congress recognized at the time that the Comptroller had no power to authorize the creation of affiliate banks.

Finally, two statutes other than the Act of 1933 discussed above provide evidence of continued Congressional familiarity with and approval of affiliation among banks. The Bank Holding Company Act of 1956, which will be

discussed below is obviously one such statute. The other is Section 8 of the Clayton Act, U. S. C., Title 15, § 19, which excepts from its general prohibition of interlocking directorates cases where an individual serves as a director of a Federal Reserve System member bank and of another bank if more than 50% of the common stock of both banks is owned directly or indirectly by the same persons. In effect a Congressional invitation to affiliate.

B. The Branch Banking Provisions of the National Bank Act Do Not Apply.

The fundamental fallacy in the Petitioner's case lies in its insistent invocation of R. S. Section 5155, as amended, U. S. C., Title 12, § 36. This statute was enacted in 1927 to permit for the first time the establishment by national banks of branch offices. As since amended, it permits national banks to set up branches in such locations as are permitted by State law to State banks. *It has no application to the formation of a new national bank, as in this case.* To establish this it is necessary only to point to the prefatory clause of Section 36, which states that contained in the Section are "The conditions upon which a national banking association may retain or establish and operate a branch or branches." The Sections of the Revised Statutes which do apply to the formation of new national banks, U. S. C., Title 12, §§ 21-28, nowhere make reference to the law applicable to branch banking.

Beyond the language of the statutes involved, there are basic practical differences between branch offices of a bank and separate banking corporations affiliated with a bank.

This respondent, the new bank, is and is intended to be, not a branch office of Haddonfield National Bank, but a separate corporate entity. It will differ from such a branch in many important respects. Quoting from the Comptroller's brief, the majority opinion of the Court of Appeals itemizes some of the more striking distinctions.

"The intervenor clearly is not a branch of Haddonfield but is a completely separate entity with certain distinguishing characteristics sufficiently so set up in the Government's brief as to justify our quoting verbatim:

> The capital structure of Delaware Valley is totally independent of that of Haddonfield National; the stock of Delaware Valley has been subscribed to and 'paid in' as required by 12 U. S. C. 53; Delaware Valley stockholders are subject to the individual liability described in 12 U. S. C. 63 [sic; repealed, 73 Stat. 457 (1959); see 12 U. S. C. § 64a], unrelated to their possible liability as shareholders in Haddonfield National; the Comptroller has assigned a name to Delaware Valley that is not susceptible of confusion with Haddonfield National; Delaware Valley will be located approximately two miles from the main office of Haddonfield National . . . the general business of banking to be conducted by Delaware Valley will 'be transacted in the place specified in its organization certificate'. (12 U. S. C. 81); deposits with Delaware Valley will be its liability not that of Haddonfield National; loan limitations on Delaware Valley will be those applicable to an independent bank, based on its own capital structure and totally independent of loan limitations applicable to Haddonfield National (12 U. S. C. 84); the limits of indebtedness which may be incurred by Delaware Valley will be as prescribed in 12 U. S. C. 82 and independent of similar limitations on Haddonfield National; the directors of Delaware Valley have been elected by its shareholders (12 U. S. C. 71), meet the citizenship, residence, and stock-ownership requirements specified in 12 U. S. C. 72, and: 'If the directors . . . shall knowingly violate, or knowingly permit any of [the] officers, agents, or servants . . . to

violate any of the provisions of [12 U. S. C. 21-214c], all the rights, privileges, and franchises of the association shall be thereby forfeited. 12 U. S. C. 93."

Moreover, the new bank will not be able to rely on Haddonfield National's deposit insurance to protect its depositors, but will have to make its own arrangements with F. D. I. C. It will not be able to rely on Haddonfield National's surplus to cover an impairment of its capital. Its depositors will not be able to have their checks certified or cashed at Haddonfield National's offices; their deposits with the new bank will not be recognized by or constitute liabilities of Haddonfield National. In short, they are and will be independent business ventures and different corporate entities, recognized as such in every respect by the law.[5]

The differences between these two contrasting forms of "multiple banking" were brought out repeatedly in the course of the relatively recent committee hearings in connection with the Bank Holding Company Act of 1956 (70 Stat. 133, U. S. C., Title 12, §§ 1841-1846).

More important, perhaps, than either the plain language of the controlling statutes or the long-recognized functional and practical differences between affiliates and branches is the unequivocal and steadfast refusal of Congress to extend the limitations controlling the establishment of branches to the creation of affiliate banks.

Group and chain banking, together with branch banking, have been collectively termed "multiple banking", and from their inception they have been the target of persistent

5. See the statement to the Senate Committee on Banking and Currency of George R. Boyles, Chairman of the Committee on Federal Legislation of the American Bankers Association, found at pp. 293-295 of *Hearings before a Subcommittee of the Committee on Banking and Currency, United States Senate (Control of Bank Holding Companies)*, 84th Cong., 1st Sess. (1955). This included an extensive tabular presentation of some of the differences between branch operations and bank holding company systems.

and violent attack by proponents of "unit banking". Even within the ranks of the proponents of "multiple banking" heated controversy has long continued over the relative merits of group and chain banking as opposed to branch banking. For a generous sampling of all views as they were expressed some thirty years ago see WILLIT, SELECTED ARTICLES ON CHAIN, GROUP AND BRANCH BANKING (1930).

It has long been generally recognized that in many cases groups or chains of affiliated banks grew up because of statutory restrictions on or prohibitions of branch banking.

> "Some difference of opinion has been observed as regards the effect of legal restrictions imposed upon branch banking in relation to the growth of group banking systems. It has been generally assumed that such developments are in anticipation of extensive legalized branch banking, and are a reaction against statutory provisions pertaining to branch banking. . . . Undoubtedly such factors are the most significant motives for group developments, but . . . the whole movement cannot be fully explained by the obstacles encountered in various instances by branch banking." CARTINHOUR, BRANCH, GROUP AND CHAIN BANKING, pp. 120-121 (1931).

> ". . . . Group banking is simply the result of the introduction into the banking field of the holding company device, which has been long known and much used in other businesses. Through the holding company a number of banks can be operated as practically one institution. Such an institution is very closely akin to a branch bank. Indeed, the opponents of group banking maintain that it is simply a device for evading the legal restrictions on branch banking." WILLIT, SELECTED ARTICLES ON CHAIN, GROUP AND BRANCH BANKING, p. 10 (1930).

"In addition to branch banking, groups and chains also are forms of multiple-office banking which may influence any tendency toward concentration in banking. A number of bank groups include branch systems, but in certain States that prohibit branch banking, group systems have served as substitutes for branch banking: for instance, groups in Minnesota and Montana held 61 percent and 52 percent, respectively, of the total deposits of all commercial banks in the State. At the end of 1961, . . . these systems operated in 14 of the 18 States where branch banking is prohibited or strictly limited." *Special Staff Report of the Board of Governors of the Federal Reserve System to the Select Committee on Small Business of the United States Senate*, "*Recent Developments in the Structure of Banking*", *January 5, 1962, p. 9.*

As demonstrated by the second of these quotations, the attack on chain and group banking as an evasion of statutory restrictions on branch banking, which is precisely the attack which the plaintiff is making in this case, was being made more than thirty years ago. During the following twenty-five years the pressure for Federal legislation controlling the activities and growth of chain and group banks, and in particular of the most prevalent form of multiple banking, the bank holding company system, has been unremitting. Never absent from proposed legislation on the subject has been the subjection of future acquisitions of affiliates to the existing geographical limitations on branch banking.

For a record of the general concern with the growth of multiple banking which prevailed thirty years ago see *Hearings Before House Committee on Banking and Currency (Branch, Chain, and Group Banking), 71st Cong. 2nd Sess. (1930), Vols. 1 & 2.* The continuing legislative interest in

the immediately subsequent years is reflected in the *Legislation Note*, "*Branch, Chain, and Group Banking*", in 48 Harv. L. Rev. 659 (1935).

Nearly every session of Congress following 1935 produced one or more bills on this subject, and ultimately a comprehensive law was enacted in 1956, the Bank Holding Company Act of 1956 (Act of May 9, 1956, c. 240, 70 Stat. 133, U. S. Ca. Title 12 § 1841-1846). Senate Report No. 1095 (U. S. Code Cong. and Admin. News, 84th Cong., 2nd Sess., 1956, Vol. 2, p. 2482 at pp. 2484-2486) summarizes the history of efforts to enact laws on the subject from 1938 to 1956.

The Bank Holding Company Act of 1956 was the result of a determined and comprehensive review of the institution of multiple banking. Several different bills were introduced in both the House and the Senate. Two of these, H. R. 6227 and S. 880, contained a provision denying the Federal Reserve Board authority to permit any bank holding company to acquire any voting shares in any additional bank "except (i) within geographic limitations that would apply to the establishment of branches of banks under the statute law of such State." *Hearings Before a Subcommittee of the Committee on Banking and Currency, United States Senate (Control of Bank Holding Companies), 84th Cong., 1st Sess. (1955), pp. 3, 25.* The injection of branch banking standards in this manner was objected to before the Senate subcommittee by the Chairman of the Board of Governors of the Federal Reserve System, and by Governor Robertson of said Board. *Ibid.* pp. 45, 47-48, 77-78, 80-81. The Comptroller of the Currency himself voiced similar objections, *ibid.* p. 82, and presented memoranda on behalf of the Treasury Department to the same effect, *Ibid.* pp. 85, 89-90. A number of representatives of bank holding companies also complained of this aspect of the bills. E.g., *ibid.* pp. 141-142, 145-146, 272, 320-321. The American Bankers Association likewise protested the application of branch standards to acquisition of affiliates by

holding companies. *Ibid.* pp. 291-295. On the other hand representatives of the Independent Bankers Association of America, frequently referred to in the hearings as the sponsor of the bills, voiced ardent support for the inclusion of the provision in question and reiterated the time-worn charge that bank holding companies had developed as a device to evade the laws on branch banking. *Ibid.* pp. 104-105, 107, 111, 112-129.

Thus the issue was squarely presented whether the limitations imposed by State law upon the establishment by banks of branch offices were to be given application to the acquisition by holding companies of new bank affiliates. The decision of the Congress was negative, and no such limitation appears in the Act.

For Camden Trust to suggest that the policy underlying the law applicable to national bank branching requires the application of that law to cases of the creation of new bank affiliates where Congress has specifically and directly rejected the same proposal in enacting the Bank Holding Company Act, is absurd. It is indeed overreaching to ask the judicial branch of the government to establish as law what the legislative has considered repeatedly and as often flatly rejected.

C. New Jersey Law, If Applicable, Would Not Prohibit the Chartering of the New Bank.

The law governing the establishment of national banks, unlike that applicable to creation of national bank branches, does not incorporate by reference the provisions of State law, and consequently the provisions of New Jersey law, so insistently invoked by Camden and the *amici*, are not relevant to the issues in this case. Nevertheless it is significant that legislative history in New Jersey itself shows no intent to apply branch banking concepts and territorial limitations to the acquisition by holding companies of additional subsidiaries, much less to the formation of new bank affiliates of existing banks.

Holding companies and multiple banking are not strangers to New Jersey and its legislature. At the end of 1929 there were in New Jersey 15 group bank systems involving 59 banks, according to information compiled by the Federal Reserve Board. *Hearings Before House Committee on Banking and Currency (Branch, Chain and Group Banking), 71st Cong., 2nd Sess., 1930, vol. 1, p. 174.* Another study in 1954 by the Federal Reserve Board, which was confined to holding company situations, showed 10 such companies in New Jersey, involving 13 banks with 32 branches. This report was declared not to be exhaustive. *Hearings Before a Subcommittee of the Committee on Banking and Currency, United States Senate (Control of Bank Holding Companies), 84th Cong., 1st Sess., 1955, pp. 56-60.*

Against this background, in 1957 New Jersey enacted a comprehensive law regarding ownership of bank stocks, L. 1957, c. 79, p. 133, N. J. S. A. 17:9A-344 to 354. Any company which owns 25% or more of the stock of any bank may acquire no more than a 10% interest in any other bank. Thus holding companies are effectively limited to one subsidiary. However, the law contains no provision preventing the acquisition of ownership or control or the formation of any number of banks by a single individual or by a group of individuals. The sort of affiliation that is here to exist between Delaware Valley and Haddonfield National Bank has not been proscribed by this statute, nor has it been subjected to the territorial limitations applicable to branch banking.

In addition, the provisions of Article IV of the New Jersey Banking Act of 1948 governing the grant of charters for state banks, N. J. S. A. 17:9A-9 et seq., reveal no legislative objection to the acquisition by shareholders of an existing bank of the stock initially issued by the new institution, nor any justification under such circumstances for the application of branch banking limitations.

The claim has been vigorously advanced by the State of New Jersey throughout these proceedings that if the directors of a New Jersey state bank sought to create an affiliate in a location foreclosed by the presence of an existing bank to the opening of a branch, the application would be considered as a branch application and rejected by the Commissioner of Banking and Insurance of New Jersey. The sole authority for this is an affidavit of the present Commissioner as to how he would treat such an application if it were to be presented to him. Such a hypothetical statement of intention would be entitled to little weight at best. In this case its probative value is nullified by the fact of record that the same Commissioner permitted in 1958 precisely that which, it is now claimed, he would forbid. At that time application was made for a new state bank charter for the State Bank of Rahway. The chief organizer of the proposed new bank was President of the existing Community Bank of Linden, which was barred by New Jersey law from opening a branch at the proposed Rahway location. This organizer testified before the Commissioner that 5 of the 9 directors of the new bank would also be directors of the Community Bank of Linden. Testimony in protest was given by the President of another bank on the grounds that control of the new bank would be in the group controlling the Community Bank of Linden, and that the formation of the new bank was a circumvention of the statutory bar against a Community Bank branch in Rahway. The Commissioner nevertheless granted the charter (R. pp. 97a-101a).

D. The Administrative Procedure Act Does Not Authorize Judicial Review.

A final ground for approval of the decision below—one which the Court of Appeals did not find it necessary to consider, since it approved the action of the Comptroller which Camden challenges—is that judicial review or re-

straint of the chartering of the new bank by the Comptroller is not warranted.

Ever since the decision of this Court in *Adams v. Nagle*, 303 U. S. 532 (1938), the only permissible grounds for judicial review of official actions by the Comptroller have been fraud or a mistake of law so exaggerated as to amount to a total disregard of the statutory mandate or to constitute acting "in the teeth" of the statute.

Section 10 of the Administrative Procedure Act (60 Stat. 243 U. S. C., Title 5, § 1009), in its introductory clause, denies judicial review of "agency action . . . by law committed to agency discretion". This in no way conflicts with the guiding principles established in *Adams v. Nagle*. Facts which would support a holding that agency action "wholly disregards" or "acts in the teeth of" the mandate of the governing statute, in the words of Mr. Justice Roberts in that case, would under the Administrative Procedure Act call for a holding that the agency has exceeded the limits of "agency action . . . by law committed to agency discretion".

The statutes governing the formation of national banks vest broad discretion in the Comptroller to approve or disapprove. See the language of R. S. § 5169; U. S. C., Title 12, § 27:

> "If, upon a careful examination of the facts so reported, *and of any other facts which may come to the knowledge of the comptroller . . . it appears* that such association is lawfully entitled to commence the business of banking, the comptroller shall give to such association a certificate. . . . But the comptroller *may* withhold . . . his certificate . . . *whenever he has reason to suppose that the shareholders have formed the same for any other than legitimate objects contemplated by this chapter.*" (Emphasis added.)

See also *Apfel v. Mellon*, 59 App. D. C. 94, 33 F. 2d 805 (1929), *cert. den.* 280 U. S. 585 (1929), holding that the

statutory power to "approve" the chartering of Edge Act corporations connoted a discretionary power in the Federal Reserve Board to look beyond fixed statutory requirements, into such matters as character and competence of management.

Having attacked the action of the Comptroller in an area thus confided to his discretion, Camden could succeed only by showing a flouting of a clear statutory mandate limiting the scope of his discretion. Instead of such a clear statutory mandate Camden offers only strained deductions of Congressional intent which themselves fly in the face of the plain words of the statutes and the unmistakable record of legislative intent.

II.

There Is No Important Question of Federal Law.

Camden Trust's claim that this case presents a most important question of statutory construction under the National Bank Act — the sole basis for its petition for a writ of *certiorari* — has been shown totally to disregard banking history.

The Congress and the banking community have been aware for more than thirty years that where bank branches are prohibited or severely limited by law, new banks, affiliated in varying manner and degree with existing institutions, have invariably been chartered. Throughout the course of the growth of chain and group banking it has been apparent, and the subject of comment, that many groups or chains of affiliated banks grew up because of statutory restrictions on or prohibitions of branch banking. Awareness of this fact appears throughout the record of the 1930 Congressional hearings concerned with branch, chain and group banking.

In 1933 Congress took positive steps to eliminate certain abuses and dangers attendant upon some group and chain systems, and in 1956 additional legislative controls were imposed. At the latter date Congress specifically rejected determined efforts to subject the creation of addi-

tional banking affiliates to the geographical limitations applicable in the jurisdiction to the establishment of bank branches.

Despite the intimate familiarity of the Congress with every aspect of group and chain banking and the tireless attacks leveled at affiliate banking by determined opponents for more than a quarter of a century, it has never been supposed that under existing banking laws the Comptroller of the Currency or State bank supervisory officials are required, when confronted with an application for the formation of a new bank having stockholders or directors in common with an existing bank, to treat the new bank as a branch of the existing one. The novelty of such a proposition speaks more of unsound legal theory than it does of the importance of the question it presents. What the Congress and the banking community have accepted as normal for so long cannot be thus transformed at this late date into a burning issue.

The petitioner specifically claims importance for this case on the ground that the decision confers upon national banks an "enormous competitive advantage" over state banks. This assumes, without support from the record or in fact, that the action of the Comptroller which the two lower courts have approved finds no parallel in the actions of any State bank supervisory agency. But in jurisdictions which, like Florida and Texas, prohibit branch banking[6] the existence of widespread chains and groups of affiliated banks, both State and national, is well known. Thus the decision of the Court of Appeals gives national banks no competitive advantage over State banks in such jurisdictions, but rather preserves their competitive equality. In those jurisdictions where State-wide branch banking is permitted[7] there could obviously be no competitive advantage, even if we assume, *arguendo*, that a State bank might be

6. There are 15 such jurisdictions. See Appendix A to Brief of *Amicus Curiae*, the National Association of Supervisors of State Banks.

7. There are 19 such jurisdictions. *Ibid.*

denied the privilege of organizing affiliates.[8] And as to those jurisdictions in which branch banking is permitted, but subject to geographical limitations[9]—typified by New Jersey, the State here involved—the record includes no more than protestations by that State's administrative officer as to what action would be taken in that State under circumstances such as those of this case, which are refuted by the facts shown of record that New Jersey has recently chartered an affiliate State bank in a strikingly similar case.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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8. Note that the only State which prohibits chain banking is Mississippi. Brief of *Amicus Curiae*, the National Association of Supervisors of State Banks, p. 8.

9. There are 15 such jurisdictions. See Appendix I to Brief of *Amicus Curiae*, the National Association of Supervisors of State Banks.